



RIGHTS STUFF

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Transsexuals Protected By Sex Discrimination Laws

Diane Schroer is a male-to-female transsexual. In August of 2004, before she changed her legal name or began presenting as a woman, she applied for the position of Specialist in Terrorism on International Crime with the Congressional Research Service (CRS) at the Library of Congress. Her name at that time was David Schroer. The specialist provides expert policy analysis to congressional committees, members of Congress and their staffs and must have a security clearance.

By all accounts, Schroer was well-qualified for the job. She is a graduate of both the National War College and the Army Command and General Staff College. She holds masters' degrees in history and international relations. She was in the Armed Forces for 25 years, holding important command and staff positions. One of her duties included regularly briefing senior military and government officials, including the vice president, the secretary of defense and the chairman of the joint chiefs of staff.

When she interviewed for the job, she dressed in men's clothes, as she had not yet begun the transitioning process. She received the highest interview score of the 18 candidates. In mid-December, 2004, Charlotte Preece of CRS offered Schroer the job. After the parties agreed on her pay, she accepted, and Preece began filling out necessary paperwork. Before Preece had submitted the paperwork, Schroer asked her to lunch to explain her situation. She dressed as a man for the lunch. At the lunch, Preece told Schroer that she was significantly better than the other

candidates and said how excited they were that she would be working with them. After further discussion, Schroer told Preece that she was beginning to present as a woman on a full-time basis. She said that she would report to her new job dressed as a woman and using the name Diane.

Preece's first reaction was to ask "Why in the world would you want to do that?" Schroer explained to her that she did not see her status as a transgender person as a choice. She explained her history and plans for future surgery. They discussed whether her name change would affect her security clearance. At the end of the lunch, Preece said, "Well, you've given me a lot to think about. I'll be in touch."

Preece went back to her office and discussed the question of Schroer's transgender status and her security clearance with co-workers. The personnel security officer said he would look into the issue. At this point, Preece later testified, she was leaning against hiring Schroer, regardless of the outcome of the security clearance question. She said that she thought some of Schroer's contacts would not want to continue to associate with her because of her status, but admitted she did not discuss this with Schroer or any of her references, all of whom knew about her status. She was also concerned about Schroer's credibility when she testified before Congress. The congressional committee would be given a copy of her biography and would know that she was transgender. Preece said she was

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Employee Lawfully Fired For Lying About Disability

A law firm was within its rights when it terminated an employee it believed was lying about having a disability and illegally collecting disability benefits.

Teresa M. Brooks, a legal secretary for Peabody & Arnold, LLP, had back pain that her employer accommodated. The firm gave her a special chair, allowed her to miss work for physical therapy, allowed her to work from home and provided other employees to assist her with any heavy lifting.

After 16 years with the firm, Brooks received a written disciplinary warning for inappropriate use of firm e-mail and excessive absenteeism. About a week later, she received another written warning, this time for tardiness. Brooks did not attend work the next day, and her employer received a fax from Brook's doctor stating that because of her back condition, she was "disabled from all work." Her doctor provided her employer with a "Certification of Health Care Provider," as required by the Family

and Medical Leave Act, stating that Brooks had a "complete disability."

The firm agreed to place her on short-term disability leave, if she would see a second doctor, chosen by the company. Brooks complied, and the second opinion confirmed the first, noting that her distinct forward bend and use of a cane indicated a "disabling degree of pain."

The firm became suspicious because Brooks had never used a cane at work, had gone on a vacation to Disney World, and had become unable to work the day after receiving a disciplinary warning. It hired a private investigator who videotaped Brooks walking up and down stairs, bending, lifting, turning, working in the yard, shopping carrying groceries and lifting packages from her car. She never walked with a limp, used a cane or otherwise demonstrated any pain or difficulty. She also sat for more than three hours playing slot machines at a casino after she claimed she could not sit at her desk at work.

After the company showed the second doctor the private investigator's video, he immediately withdrew his diagnosis. The firm concluded that Brooks had misled it in order to collect disability benefits, and fired her.

Brooks sued, alleging that her termination was on the basis of her disability. A trial court granted summary judgment for the employer. On appeal, Brooks argued that the employer's "unprecedented" enforcement of its attendance policy was evidence that its reason for firing her was discriminatory.

The firm, however, argued that it did not fire Brooks for her attendance problem, but for lying to collect disability benefits. "The decision to terminate the plaintiff 'may be unsound or even absurd, but, if the reason given for the decision is the real reason and is nondiscriminatory,' and the plaintiff cannot show that it is a pretext, then the plaintiff cannot prevail," said the Court. Brooks v. Peabody & Arnold, LLP, 71 Mass. App. Ct. 46 (2008). ♦

Cerebral Palsy Not Necessarily A Disability Under The ADA

The 10th Circuit Court of Appeals has ruled that cerebral palsy is not a disability under the ADA - at least not when the employee can take care of herself and perform manual tasks.

Dawn Holt, an employee of a mental health center, suffered from a mild form of cerebral palsy. The disease adversely affected her speech and her ability to perform certain activities requiring fine mo-

tor coordination. In particular, she cited problems buttoning her clothes, chopping, peeling, slicing food and cutting her nails.

Holt began working at the mental health center in 1993 and received several promotions and outstanding performance evaluations. However, early in 2001, her performance began to deteriorate. According to her supervisor, her behavior became erratic, she was late to meet-

ings and her staff complained that she was "hiding in her office" and not providing leadership. Holt told her supervisor that she was experiencing ongoing domestic violence.

After returning from a paid administrative leave ordered by the supervisor, Holt attended a public meeting at which she was criticized. Her response was to cover her ears, rock back and forth and suck her

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Sex Discrimination Laws (Continued from page 1)

also concerned about Schroer's trustworthiness because she had not brought her status up before. She said she was concerned that the transition might distract Schroer from her job. Finally, she said she was concerned that David's security clearance would not transfer to Diane.

Preece talked to other people at CRS, one of whom asked if she had a good second candidate for the job. Preece testified later that she was puzzled about how "someone [could] go through the experience of Special Forces [and] decide that he wants to become a woman." CRS decided not to hire Schroer because of concerns about her security clearance and because the second choice candidate presented "fewer complications."

Schorer sued, alleging that CRS had discriminated against her on the basis of her sex. CRS said they had legitimate, nondiscriminatory reasons for withdrawing the job offer, but a federal court recently disagreed. The Court said that the security clearance reasons were pretextual. CRS made no effort to find out if there was indeed a problem with her security clearance and if there was, how long it would take to resolve the problem. Preece just assumed it would take a year or longer. The Court also said the trustworthiness and distraction concerns were pretextual. CRS

made no attempt to talk to Schorer about whether her transition would be a distraction. Similarly, the Court said that CRS's concerns about Schorer's credibility before Congress were pretextual; they made no attempt to find out if this concern was reasonable, and employers aren't allowed to defer to the real or presumed biases of others.

The Court said that Schroer had presented direct and compelling evidence that CRS's decision was infected by sex stereotypes. The evidence showed that CRS was enthusiastic about hiring David Schroer until she disclosed her transsexuality. CRS revoked the offer once it learned that she intended to become, "legally, culturally and physically, a woman named Diane. This was discrimination 'because of ... sex.'" The Court imagined a case where an employee is fired because she converted from Christianity to Judaism. The employer argues that he has no bias against Christians or Jews but does have a bias against converts. The Court said that no one would say that a convert is not covered by the ban against religious discrimination, and similarly, a "convert" from one sex to another should also be protected by the ban against sex discrimination.

Some other Courts have said that transsexuals are not covered by the federal ban against sex discrimina-

tion, but this Court said that this represents "an elevation of 'judge-supposed legislative intent over clear statutory text.' To say that discrimination based on changing one's sex is not discrimination because of sex essentially reasons 'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" The Court said that is "no longer a tenable approach to statutory construction."

CRS argued that Congress has recently considered, but has not passed, bills that would have added gender identity to Title VII, the federal fair employment law. This meant, according to CRS, that Congress did not intend to protect transsexuals from discrimination. Schroer in turn argued that it could mean that Congress believed such an amendment was not necessary because transsexuals were already protected by the ban against sex discrimination. The Court said that was a reasonable argument and that it is hazardous to rest an interpretation of a prior statute when it concerns a proposal that did not become law.

The case is Schroer v. Billington, 2008 WL 4287388 (D.D.C. 9/19/08). ♦

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Cerebral Palsy And The ADA

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thumb. Shortly afterwards, the center reassigned her to another position. Holt had trouble adjusting to her new position and told her new supervisor that she was overwhelmed by the paperwork and had difficulty with the volume of writing required of her, due to her cerebral palsy.

The center removed Holt from her position and offered her another involving less responsibility and lower pay. They left open the possibility of her returning to her old job

some day. Holt declined the offer, left the center and sued.

The Trial Court granted summary judgment to the employer, and the Tenth Circuit affirmed. Citing the U.S. Supreme Court's ruling in Toyota Motor Mfg. Ky., Inc. v. Williams 534 U.S. 184 (2002), it said that a "substantial" impairment to a major life activity is one that prevents or severely restricts someone from performing activities that are of central importance to most people's daily lives and that is permanent or long-term.

Here, the Court ruled, Holt's limitations were narrow and specific and did not severely restrict her ability to perform a broad range of manual tasks. For example, she must ask for help in buttoning her clothes, but is able to dress herself. She cannot cut her own nails but is able to maintain her personal hygiene. For purposes of the ADA, she was not a "qualified individual with a disability." Holt v. Grand Lake Mental Health Center, Inc., 443 F.3d 762 (10th Cir. 2006). ♦

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